UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JOHNSON CONTROLS, INC. **Employer** **and** **INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, AND ITS AFFILIATED LOCAL UNION NO. 3066** **Charging Party** **and** **BRENDA LYNCH AND ANNA MARIE GRANT** **Intervenors**	**Case No. 10-CA-151843**

RESPONDENT JCI'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF TO JCI'S LIMITED-CROSS EXCEPTIONS

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I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Johnson Controls, Inc. ("JCI" or "Company") respectfully files this brief in reply to the brief filed by the Counsel for the General Counsel ("General Counsel") on April 26, 2016, in response to JCI's Limited Cross-Exceptions and supporting brief.[1] To reduce repetition, the statement of the case previously provided by JCI in earlier briefing is fully incorporated herein.

The ALJ properly found that "[t]he Respondent did not violate the Act in any manner alleged in the complaint" and properly dismissed the complaint in the instant matter. (ALJD, p. 15, L.35-36; and p. 16, L.4). The ALJ also premised his decision on appropriate findings of fact, credibility determinations, and relevant legal authority except as for the instances outlined in Respondent's Limited Cross-Exceptions.

II. ARGUMENT

a. The General Counsel's Argument that the authorization Cards presented in this case are sufficient to revoke employees' prior support for the Employee Petition are without merit.

JCI has shown that the union authorization cards submitted by the General Counsel as evidence[2] and at issue in this case ("Card(s)") are insufficient to show that any employee who signed such a Card had unequivocally revoked his/her support for the employee disaffection petition ("Employee Petition"). The General Counsel attempts to rebut this by citing to a number of cases dealing with the sufficiency of language on an authorization card. However, the arguments and cases cited by the General Counsel are readily distinguishable from the facts in

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[1] References to the ALJ's Decision are identified by the letters "ALJD" followed by page and line number, e.g., "ALJD, p.__, L.__." References to the hearing transcript are identified as "TR." followed by the page and line number, e.g. "TR., p. __, L.__." References to exhibits introduced by the Respondent are by the letters "RES Ex." followed by exhibit number(s), e.g., "RES Ex. __." References to exhibits introduced by the General Counsel are by the letters "GC Ex." followed by exhibit number(s), e.g., "GC Ex. __."

[2] The union authorization cards at issue in this case were introduced as GC Exs. 8, 9, 10, 11, 12, 13, & 14.

this case and are insufficient to rebut the legal and factual case set forth by JCI or the findings of the ALJ.

First and foremost, it is uncontested that the language on the purpose and potential uses for the Employee Petition in this matter are clear. The petitioners were intentional in incorporating language that fully informed employees as to what they were signing and how it could be used.[3] In complete contrast to the Employee Petition, the authorization Cards here are inherently vague, ambiguous, and misleading, particularly under the facts of this case.[4]

As shown in JCI's Limited Cross-Exceptions, the Board has held that in order for a document ascertaining majority status to be sufficient to show employee intent in a withdrawal of recognition, the language must be specific as to its purpose and potential uses. Ambiguously worded documents, standing alone, are insufficient to ascertain employee intent when majority status is in question. *Pic-Way Shoe Mart*, 308 N.L.R.B. 84, 87 (1992); *Laidlaw Waste Systems*, 307 N.L.R.B. 1211, 1214 (1992). For a document to effectively revoke previous support for an employee disaffection petition, the Board considers "whether the evidence established an unequivocal[5] post-petition demonstration of support for the union." *See HQM of Bayside, LLC*,

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[3] The clear language of the Employee Petition stated: WE, THE UNDERSIGNED, EMPLOYEES OF Johnson Controls, Florence facility, DO NOT WISH TO CONTINUE TO BE REPRESENTED BY THE United Auto Workers, LOCAL UNION NO. 3066 FOR PURPOSES OF COLLECTIVE BARGAINING OR ANY OTHER PURPOSE ALLOWED BY LAW. WE UNDERSTAND THIS PETITION MAY BE USED TO OBTAIN AN ELECTION SUPERVISED BY THE NATIONAL LABOR RELATIONS BOARD OR TO SUPPORT WITHDRAWAL OF RECOGNITION OF THE UNION. (*See* RES Ex. 1) (emphasis in the original document).

[4] All but one of the Cards presented by the General Counsel were allegedly signed when the Union was already the representative of the employees at the facility -- leading employees to believe that it did not matter if they signed the Cards. Indeed, one employee who signed an authorization Card provided an affidavit to the General Counsel expressly disclaiming that he ever supported the Union, yet the General Counsel still introduced the employee's signed authorization Card as evidence that the employee revoked his support of the Employee Petition. None of the Cards advise employees that by signing the Card, the employees are revoking their prior signature on the Employee Petition or their support for the withdrawal of recognition.

[5] Black's Law Dictionary defines unequivocal as "unambiguous; clear; free from uncertainty." *See* Black's Law Dictionary (10th ed. 2014).

348 N.L.R.B. 758, at fn. 13 (2006) *citing Parkwood Development Center, Inc.*, 347, N.L.R.B. 975 (2006); *Highlands Regional Medical Center*, 347 N.L.R.B. 1404 (2006).

Board precedent clearly recognizes that a "post-[disaffection]petition demonstration of [union] support" is unique, and requires more than an ambiguously worded document for it to be established. Essentially, the Board has recognized that if there are two competing documents that purportedly reflect opposing employee views on whether a union *maintains* majority status, any subsequent writing that attempts to revoke a prior signature must show "unequivocal support" for its position, and must be free from ambiguity as to its purpose and effect. *Id.*

JCI has demonstrated a clear contrast in the language the Board has deemed sufficient to show "unequivocal support" for a union following a disaffection petition in other cases, and the ambiguously worded authorization Cards in the instant case. JCI cited a number of cases where the Board has examined whether a signed document supporting a union subsequent to a signature on a disaffection petition is sufficient to effectively revoke the previous signature on a disaffection petition. In all of the cases where the Board found that employees effectively revoked their prior support of a disaffection petition, the document was very specific and either expressly revoked any prior support of a disaffection petition, or clearly indicated union support, leaving no doubt about the intention of the employee. *See HQM of Bayside, LLC*, 348 N.L.R.B. 758 at 758 (2006) (where the Board held that employee signatures on a petition stating, "[w]e the following employees of [the employer], DO NOT wish to withdraw recognition and or representation of United Food and Commercial Workers Local 400" was sufficient to show unequivocal support for the union and effectively revoke prior signatures on an employee disaffection petition. (2006)(emphasis in the original); *Parkwood Development Center, Inc.*, 347, N.L.R.B. 975 (2006) (where the Board stated that employee signatures on a petition stating that

the signature would "revoke, rescind and cancel any previous statements that I might have made to the contrary" was sufficient to show unequivocal support for the union); *Freemont-Rideout Health Group*, 354 N.L.R.B. 453 (2009)(union cards stating "I…hereby revoke my signature on any card, petition, or other document I may have signed at any time repudiating or disavowing support for [the union] as my representative with respect to the terms and conditions of my employment with [the employer] and hereby affirm and/or reaffirm my support for [the union]" was sufficient to show unequivocal support for the union); *See also Scoma's of Sausalito, LLC,* 362, N.L.R.B. No. 174 (2015) (the document relied upon by the union to establish that the employees revoked their early signature on the disaffection petition stated, "If I signed a petition to decertify or get rid of the Union, I hereby revoke my signature. I do wish to continue being represented by Unite Here Local 2850. . .").

There is nothing "unambiguous, clear, or free from uncertainty" in the Cards at issue in this case. The General Counsel cites *Highlands Regional Med. Ctr.*, 347 N.L.R.B. 1404 (2006), to support the position that a union authorization card purportedly similar to the Cards at issue in this case shows unequivocal support for the union following an employee's prior support of a disaffection effort. However, the General Counsel's reliance on *Highlands* is misplaced. To begin with, in *Highlands*, the disaffection petition itself was insufficient as it did not state that employees signing the petition supported the withdrawal of recognition of the union or no longer supported the union. Further, there was only one employee (Shirley Mausser) at issue as to whether she had revoked her support for the disaffection petition (even if the petition was assumed to be adequate for withdrawing union recognition). It should be noted, however, that the General Counsel only "assume[s]" what the language on the card signed by Mausser was, as the decision did not outline the language on the card except to note that the card authorized the

union to deduct dues from the employee's paycheck. It is true that the Board found that there was sufficient evidence demonstrating that Mausser had, in fact, withdrawn her support for the disaffection petition. Such evidence included that following Mausser's signing of the disaffection petition and before the employer's withdrawal of recognition: (i) she had signed the union's application for membership; (ii) she had joined the union; (iii) she had authorized the deduction of union dues from her wages; and (iv) she had started having union fees deducted from her paychecks. Not surprisingly, the Board found that such evidence established that Mausser had withdrawn her support for the disaffection petition and the employer could no longer use her name on the petition to support the withdrawal of recognition. None of those facts exist in this case - - no employee *after* signing the Employee Petition, took the affirmative steps of completing an application for membership, joining the union or signing an authorization for dues deduction. Giving a union authorization to deduct union dues from an employee's paychecks is undoubtedly more indicative of unequivocal union support than simply signing a card authorizing the union to do something that it is already doing – acting as an employee representative.

The General Counsel urges the Board to find that the authorization Cards at issue here are sufficiently clear and unambiguous on their face to unequivocally show that the employees who signed them intended to revoke their support for the Employee Petition. However, the General Counsel has wholly failed to consider the context of the Cards in this case and its impact on the ambiguity of the Cards. The only case cited by the General Counsel on this point is distinguishable from the facts of this case. The General Counsel cites *Poughkeepsie Newspapers*, 177 N.L.R.B. 972 (1969) to support its contention that the Cards at issue here are sufficient to revoke support for the Employee Petition. However, the General Counsel fails to

recognize that this case is not analogous to the present facts as it only deals with a union authorization card in the setting of a union attempting to *gain* initial recognition based on a majority of signed cards authorizing that distinct action, and where no other signed instruments exist that are diametrically opposed to those cards. This case does not deal with two competing writings and was not analyzed under the special circumstances acknowledged by the Board to be applicable in such situations as outlined above.

Here, the Cards at issue in this case are facially ambiguous as to their purpose as they say nothing about revoking signatures on the Employee Petition; say nothing about keeping the Union as the bargaining representative of the employees; and say nothing to inform employees that the Cards could be used to stop JCI from withdrawing recognition from the Union. Furthermore, the facial ambiguity of the Cards at issue in this case is exacerbated by the context of the facts as they existed at the time the Cards were purportedly signed. The Board has held that determining whether words and phrases are ambiguous requires an examination of the entire context connected to those words and phrases. *See Temple Security, Inc.*, 337 N.L.R.B. 372 (2001) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (holding "the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context")). All but one of the Cards at issue in this case were allegedly signed when the Union was already the representative of the employees at the facility[6] and the Company had already notified the Union and employees that it would withdraw recognition of the Union upon expiration of the current collective bargaining agreement -- leading employees to

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[6] The UAW was not the representative of employees when Martha Rogers signed a Card as the Company had already withdrawn recognition. ALJD, p. 15, L. 3-4; TR., p. 94, L. 4-8.

believe that signing a Card did not matter.[7] The General Counsel cannot credibly contend that the Cards *unequivocally* establish that the employees desired to revoke their support of the Employee Petition and JCI's withdrawal of recognition.

Finally, the clear ambiguity of the Cards at issue in this case is shown through the direct testimony of employees at the hearing in this matter. Employees who signed both the Employee Petition and a Card testified that they did not understand the purpose of the Cards and, by signing the Cards, never intended to revoke prior support of the Employee Petition. *See* (Testimony of employees Jefferson and McFadden at TR., p. 73, L. 15-22; TR., p. 75, L. 12-18; TR., p. 130, L. 6-8; p. 133, L. 17-24; TR., p. 134, L. 11-13).[8]

Given the above, the Cards at issue in this case are incapable, both legally and practically, of showing "unequivocal support" for the Union sufficient to revoke employees' support for the Employee Petition.

b. The General Counsel's Arguments that oral statements of disaffection are somehow insufficient objective evidence to support a withdrawal of recognition is directly contrary to the applicable case law and has absolutely no legal basis.

In its Limited Cross-Exceptions, JCI fully outlined that the ALJ's decision should include a full accounting of all objective support as proven by JCI at the hearing – including both the signatures on the Employee Petition and the oral statements from employees that JCI knew about and relied upon in withdrawing recognition. In response, the General Counsel argues that oral statements of opposition to the Union or support for the Employee Petition are not objective evidence to support a withdrawal of recognition. The position of the General Counsel is entirely

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[7] Indeed, one employee who signed an authorization Card provided an affidavit to the General Counsel expressly disclaiming that he ever supported the Union, yet the General Counsel still introduced the employee's signed authorization Card as evidence that the employee revoked his support of the Employee Petition.

[8] This testimony regarding the ambiguity surrounding the Cards is fully outlined in JCI's earlier briefing to the Board in this case.

without merit for at least two reasons: (1) these arguments are completely contrary to the controlling case law; and (2) these arguments have absolutely no basis in any binding case law.

The Board and courts have repeatedly held that oral statements from employees are sufficient objective evidence for an employer to rely on when withdrawing recognition. *See e.g.*, *NLRB v. Mullican Lumber*, 535 F.3d 271 (4th Cir. 2008) (where the 4th Circuit held that management testimony recounting employee statements to supervisors that they did not want the union and that a majority of employees did not want the union was sufficient evidence to overcome the presumption of continued majority support for the union); *MSK Corp.-Main Event Food Serv.*, 341 N.L.R.B. 43 (2004) (where the Board found employee statements opposing the union to employer representatives were "entitled to substantial weight"); *A.W. Schlesinger Geriatric Center*, 304 N.L.R.B. 296 (1991)(where the Board found "statements made by…employees who had not signed the petition are material" to inquiry of whether union has lost majority support); *Wallkill Valley General Hosp.*, 288 N.L.R.B. 103 (1988)(where the Board found "numerous statements made to [the company] by its employees" together with a decertification petition, constituted objective evidence of the union's loss of majority support); *Glosser Bros. Inc.*, 271 N.L.R.B. 710 (1984)(where the Board found "direct statements" of employees to their manager that each of the employees did not want union representation and "estimates of supervisors and employees as to the state of desires of a majority of employees" relevant to question of whether union had majority status); *Sofco, Inc.*, 268 N.L.R.B. 159 (1983) (where the Board found an employer is entitled to provide "testimony concerning specific conversations with a number of individuals, none of whom testified at the hearing," because "[s]uch statements by employees are 'objective, identifiable acts' on which the [employer] was entitled to rely…." when determining majority status).

Although the General Counsel has no case law to support its position, the General Counsel argues that because all of the cases cited by JCI, save the *NLRB v. Mullican Lumber*[9] case, were decided prior to the Board's decision in *Levitz*, those cases have no legal effect under the facts of this case. Whether the standard is the pre-*Levitz* good faith doubt standard, or the *Levitz* objective evidence standard, oral statements of union disaffection satisfy both standards. The Board has long held that oral statements of disaffection are, in fact, sufficient to "demonstrate that they had repudiated the union and no longer wished to be represented." *See A.W. Schlesinger Geriatric Center*, 304 N.L.R.B. 296 (1991)(emphasis added) Therefore, the arguments of the General Counsel fail. If such oral statements can show under the preponderance of the evidence that, in fact, employees no longer want to be represented by a union; these same oral statements are sufficient objective evidence to support a withdrawal of recognition.

III. CONCLUSION

WHEREFORE, for the reasons stated in the ALJ's decision and those stated herein and in Respondent's prior pleadings in this case, Respondent JCI prays that the Board uphold the ALJ's conclusion that the Respondent did not violate the Act in any manner alleged in the complaint and the ALJ's dismissal of the complaint in its entirety.

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[9] Interestingly, the facts from the instant matter arose in the Fourth Circuit which would bind the Board to this precedent in this matter.

Respectfully submitted this 10th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent JCI's Reply Brief to General Counsel's Answering Brief to JCI's Limited Cross-Exceptions has been served via email on the following on the date below by Johnson Controls, Inc.:

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Dated this 10th day of May, 2016.